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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET L. ACKER, *et al.* and ROBERT L. AURICH, *et al.*,
Petitioners

v.

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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STATEMENT OF QUESTION PRESENTED

Whether teachers employed by an agency of the United States in the area of the former Panama Canal Zone, who were required to be transferred to the Department of Defense Dependent Schools by provisions of the Panama Canal Treaty of 1977 and the Panama Canal Act of 1979, and teachers employed by DoDDS assigned to that area on and after the effective date of the Treaty and Act, are "teachers" within the meaning of the Defense Department Overseas Teachers Personnel and Pay Practices Act of 1959, 20 U.S.C. § 901, et seq.

PARTIES TO THE PROCEEDING

Petitioners AURICH, et al. and ACKER, et al. consist of individual Plaintiffs whose cases were consolidated in the Claims Court, and whose names appear below. They respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this proceding on March 18, 1986. The Respondent is the UNITED STATES. There were no other parties below.

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CITATION OF OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit has been reported at 786 F.2d 1126 (Fed. Cir. 1986) and is included within the Appendix to this Petition, commencing at p. 1a. The Decision of the Claims Court, Hon. Harry E. Wood, granting Summary Judgment for Defendant has not been generally reported, but appears in the Appendix commencing at page 7a.

JURISDICTION

The Judgment of the Court of Appeals was entered on March 18, 1986. App. 6a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Defense Department Overseas Teachers Personnel and Pay Practices Act of 1959, 20 U.S.C. § 901, et seq., provides in pertinent part as follows:

§ 901. Definitions

For the purposes of this chapter, the term—

(1) "teaching position" means those duties and responsibilities which—

(A) are performed on a school-year basis principally in a school operated by the Department of Defense in an overseas area for dependents of members of the Armed Forces and dependents of civilian employees of the Department of Defense, and

* * * *

(2) "teacher" means an individual—

(A) who is a citizen of the United States,

(B) who is a civilian, and

(C) whose services are required on a school-year basis in a teaching position.

(3) "overseas area" means any area situated outside the United States.

(4) "United States", when used in a geographical sense, means the several States of the United States of America, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, the Canal Zone, and the possessions of the United States (excluding the Trust Territory of the Pacific Island and Midway Islands).

* * * *

§ 903 Administration—Employment and salary practices

* * * *

(c) The Secretary of each military department shall fix the basic compensation for teachers and teaching positions in his military department at

rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population.

* * * *

§ 904 Leave—Entitlement; amount

(a) Subject to the regulations prescribed and issued by the Secretary of Defense under Section 902 of this title, each teacher (other than an individual employed as a substitute teacher) shall be entitled to cumulative leave, with pay, which shall accrue at the rate of one day for each calendar month, or part thereof, of a school year, except that—

* * * *

(2) not more than seventy-five days of leave may accumulate to the credit of a teacher at any one time under this subsection.

* * * *

§ 905 Quarters, quarters allowances, and storage—Entitlement

(a) Under regulations which shall be prescribed by or under authority of the President, each teacher (other than a teacher employed in a substitute capacity) shall be entitled, in addition to basic compensation, to quarters, quarters allowance, and storage as provided by this section.

Furnishing of living quarters or grant of allowance

(b) Each teacher (other than a teacher employed in a substitute capacity) shall be entitled, for each school year for which he performs services as a teacher, to quarters or a quarters allowance equal to those authorized by the Act of June 26, 1930.

The Act of June 26, 1930, referred to in 20 U.S.C. § 905 is now found at 5 U.S.C. § 5912, and provides in pertinent part:

> **§ 5912. Quarters in Government owned or rented buildings; employees in foreign countries**
>
> Under regulations prescribed by the head of the agency concerned and approved by the President, an employee who is a citizen of the United States permanently stationed in a foreign country may be furnished, without cost to him, living quarters, including heat, fuel, and light, in a Government owned or rented building. The rented quarters may be furnished only within the limits of appropriations made therefor.

Pertinent provisions of the Panama Canal Act of 1979, 22 U.S.C. § 3601, et seq., are set out herein, with references to their section number and to the U.S. Code.

§ 3 of the Panama Canal Act, 22 U.S.C. § 3602 provides:

> **§ 3602. Definitions and recommendations for legislation**
>
> * * * *
>
> **Definitions**
>
> (b) Subject to the provisions of subsection (c) of this section, for purposes of applying the Canal Zone Code or other laws of the United States and regulations issued pursuant to such Code or other laws with respect to transactions, occurrences, or status on or after the effective date of this chapter—
>
> (1) "Canal Zone" shall be deemed to refer to to the areas and installations in the Republic of Panama made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements;
>
> * * * *
>
> **Applicability of subsec. (b)**
>
> (c) Any reference set forth in subsection (b) of this section shall apply except as otherwise provided

in this chapter or unless (1) such reference is inconsistent with the provisions of this chapter, (2) in the context in which a term is used such reference is clearly not intended, or (3) a term refers to a time before the effective date of this chapter.

Section 1217(d) of the Panama Canal Act, 22 U.S.C. § 3657(d) provides:

§ 3657. Recruitment and retention remuneration

* * * *

Applicability of subchapter III of Chapter 59 of Title 5

(d) Subchapter III of Chapter 59 of Title 5, relating to overseas differentials and allowances, shall not apply with respect to any employee whose permanent duty station is in the Republic of Panama and who is employed by an agency.

Section 1231 of the Panama Canal Act, 22 U.S.C. § 3671, provides, in pertinent part:

§ 3671. Transferred or reemployed employees

Terms and conditions of employment

(a) (1) With respect to any individual employed in the Panama Canal Company or the Canal Zone Government—

(A) who is transferred—

* * * *

(ii) to a position in an Executive agency or in the Smithsonian Institution the permanent duty station of which is in the Republic of Panama (including the area known before October 1, 1979, as the Canal Zone); or

* * * *

the terms and conditions of employment set forth in paragraph (2) of this subsection shall be generally no less favorable, on or after the date of the

transfer referred to in subparagraph (A) of this paragraph or the date of the appointment referred to in subparagraph (B) of this paragraph, as the case may be, than the terms and conditions of employment with the Panama Canal Company and Canal Zone Government on September 30, 1979, or, in the case of a transfer described in subparagraph (A) (ii) of this paragraph which takes place before that date on the date of the transfer.

* * * *

Applicability of sections 903(c) and 904(a)(2) of Title 20; sabbaticals

(c) (1) Section 903(c) of Title 20 shall not apply with respect to any teacher who was employed by the Canal Zone Government school system on September 30, 1979, and who transferred from such position to a teaching position which is under the Department of Defense Overseas Dependent School System and the permanent duty station of which is in the Republic of Panama, until the rates of basic compensation established under section 903(c) of Title 20 equal or exceed the rates of basic compensation then in effect for teachers who were so transferred.

(2) Section 904(a)(2) of Title 20 shall not apply with respect to any teacher who was employed by the Canal Zone Government school system on September 30, 1979, and who was transferred from such position to a teaching position which is under the Department of Defense Overseas Dependent School System and the permanent duty station of which is in the Republic of Panama.

(3) (A) The head of a department or agency of the United States may grant a sabbatical to any teacher to whom paragraph (1) of this subsection applies . . .

STATEMENT OF THE CASE

Statement Of Facts

For many years the United States exercised sovereignty over the area adjacent to the Panama Canal, within the Republic of Panama. In 1977 a historic Treaty [1] was finally negotiated between the United States and the Republic of Panama, and in 1979 Congress passed the Panama Canal Act of 1979 (hereafter the Act) to implement the provisions of the Treaty as it applied to United States participation in the Canal Zone venture, the rights of U.S. citizen employees before and after the effective date of the Treaty, and related matters.

Prior to the Treaty and the Act the canal was operated by a quasi-governmental agency known as the Panama Canal Company. A related government agency, the Canal Zone Government, operated a system of schools, government offices, and a police and court system. The Panama Canal Company/Canal Zone Government was, in substantial effect, a federal enclave of the United States situate in the Republic of Panama. Because of its unique nature as a federal enclave, of extraterritorial nature, U.S. citizen employees of the government enjoyed many benefits and living conditions unique in the federal service. Panama was neither "foreign" nor "domestic". As a result, employees were accorded separate status under many of the provisions of the U.S. Code relating to federal employees.

Among the governmental functions exercised by the Canal Company/Government was the operation of a system of schools for children of Canal Company/Government employees, including U.S. military personnel and

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[1] Actually a series of treaties and agreed minutes, alternately referred to as the Panama Canal Treaties of 1977 or the Carter-Torrijos Treaty, hereafter referred to simply as the Treaty.

civilian employees. In other parts of the world the operation of similar school systems was carried out under the Department of Defense Dependent School (DoDDS), an agency of the United States Defense Department. In order to provide uniformity of this worldwide system, and to encourage recruitment and retention of qualified teachers, Congress adopted substantial legislation over the years providing for the rights and benefits of DoDDS employees [2]. Because of the unique nature of the United States presence in the Canal Zone, and the fact that the school system in Panama was operated by the Company/Government, teachers there had traditionally not been integrated into the federal system.

One of the major underlying principles of the Treaty was acknowledgment of Panamanian sovereignty throughout the area known as the Canal Zone, and the phasing out of any U.S. presence there of a governmental nature. Certain functions, such as the court and police systems, were phased out over a period of time. Upon entry into force of the Treaty, the Canal Zone Government would cease to exist, and the Panama Canal Company would be replaced by a Commission, representing a joint venture between the United States and Republic of Panama, with control gradually shifting from the United States to Republic of Panama over a 20 year period.

Although the Panama Canal Commission would retain some of the authority and control of the former Canal Zone Government, it was specifically precluded by the Treaty from operating any system of schools in the Republic of Panama. As a result, the former school system had to be transferred, in total, to the Department of Defense. Teachers who had been employed in Panama prior to the entry into force of the Treaty, and the effec-

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[2] For example, the Defense Department Overseas Teachers Pay and Personnel Practices Act, 20 U.S.C. 901, et seq. *See*, Legislative History, 1959 U.S. Code Cong. & Admin. News, Vol. 2 at p. 1787.

tive date of the Act, were transferred to the Department of Defense Dependent Schools, and became DoDDS employees. These persons were referred to as "transfer of forces" or TOF, and the Act made specific references to them in certain instances. There were other TOF employees, such as nurses, but primarily TOF employees were teachers. After the effective date of the Treaty and the Act, other employees were hired in the United States, or were transferred from other DoDDS locations to serve as teachers in Panama.

Prior to the entry into force of the Treaty, the Company/Government owned and operated housing in areas adjacent to the Canal, which it made available to its employees, including teachers. In most cases, the employees were charged rent. Upon entry into force of the Treaty, sovereignty and title to all of this land immediately passed to the Republic of Panama, which in turn granted to the Commission the right to continued use of the housing, at no cost to the Commission, for employees "of the Commission". Many of these houses were occupied by teachers and other employees of the Canal Company/Government who would not be "employees of the Commission" after the effective date of Act and Treaty. For this reason, a specific agreed minute to the Treaties was negotiated which provided that, for a period of five (5) years, TOF employees would be considered "employees of the Commission" for purposes of housing availability.

On entry into force of the Treaty and Act, the TOF teachers in Panama discovered that they had lost many of the benefits of serving in Panama, and would lose others over the gradual phasing-in of other provisions of the Treaty. In exchange, however, they anticipated and received certain benefits, including the benefits of being included in the DoDDS worldwide system of teachers. One principal advantage of being a DoDDS teacher was the availability of housing or housing allowance, pursu-

ant to 20 U.S.C. § 905 and 5 U.S.C. § 5912 [3], and in Panama, with its rapidly changing economic and political conditions this was a substantial benefit.

DoDDS, however, took the position that teachers in Panama were not entitled to housing or housing allowance. Its argument was primarily based on one provision of the Panama Canal Act, Sec. 1217(d), 22 U.S.C. § 3657(d). In all respects other than the provision of housing, and those matters specifically exempted by statute to TOF employees, DoDDS treats its teachers employed in Panama the same as it treats teachers all over the world. In other words, except for the provision of housing or housing allowance, it considers teachers in Panama to be "teachers" within the meaning of the Defense Department Overseas Teachers Pay and Personnel Practices Act (hereafter referred to as the Overseas Teachers Act) 20 U.S.C. § 901 et seq.

With the entry into force of the Treaty and the Act, the Canal Zone ceased to exist, except as a historical reference. Since the U.S. Code had, over the years, acquired a number of references to the "Canal Zone", the Act contained an omnibus amendatory provision, in Section 3, 22 U.S.C. § 3602. Exceptions to the application of that amendatory provision are found in Section 3(c), where such application is "inconsistent" or "not intended". Since the Act and Treaty specifically provide and require the transfer of teachers into DoDDS, and the provisions of the Overseas Teachers Act, the question is squarely presented whether it is "inconsistent" to conclude that Congress intended those same teachers to be

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[3] The Court of Appeals erroneously concluded that no regulations had been promulgated. In reaching that conclusion, the Court of Appeals apparently assumed § 905 was inapplicable to the teachers. The Claims Court had correctly noted that the Secretary of State, pursuant to Executive Orders, had promulgated standard regulations which included, and applied to, Panama.

simultaneously excluded from the coverage of the Overseas Teachers Act.

After exhausting administrative appeals procedures, several teachers filed an action in the Claims Court, pursuant to 28 U.S.C. § 1491, for monetary and equitable relief against the United States, seeking class action certification on behalf of all teachers employed by DoDDS in Panama. When the Claims Court declined to certify a class action, a second (identical) suit was filed by 245 individual teachers. Motions For Summary Judgment and Cross Motions For Partial Summary Judgment were filed by the United States and the teachers in both cases, and the cases were consolidated for argument. After hearing argument, the Claims Court concluded that substitution of "areas and installations" for "Canal Zone" in § 901 was "not inconsistent", and that as a result, DoDDS teachers in Panama were not "teachers" within the meaning of the Overseas Teachers Act. The Claims Court entered summary judgment in favor of the United States on May 15, 1985. (App. p. 11a).

The Court of Appeals Decision

The Court of Appeals for the Federal Circuit mechanically applied the definitional section of the Panama Canal Act, concluding that all references in the Overseas Teachers Pay and Personnel Act, 20 U.S.C. § 901, et seq, to "Canal Zone" automatically became references to "areas and installations in the Republic of Panama made available to the United States . . .". As a result, the Court of Appeals concluded that teachers employed in the Republic of Panama by DoDDS, both TOF teachers and those employed or transferred after the effective date of the Treaty were not "teachers" within the meaning of the Overseas Teachers Act. The Court of Appeals reached this conclusion notwithstanding the government's concession that it has, at all times herein, treated those teachers as § 901 teachers for all purposes *except* housing. The Court of Appeals thus affirmed the decision of the Claims Court dismissing the complaint.

REASONS FOR GRANTING THE WRIT

A. Introduction

This case presents an important question of federal law which has not been, but should be, decided by this Court. It involves the construction of the relationship of the Panama Canal Treaty of 1977, and the Panama Canal Act of 1979, with the existing code of federal laws involving teachers employed by Department of Defense Dependent Schools and the worldwide system of schools established thereunder. The Court of Appeals construed key definitional sections of the Panama Canal Act to effectively disregard the clear Congressional directive, and to thereby remove teachers employed in Panama from the provisions of the U.S. code applicable to DoDDS teachers generally. As a result, those teachers are essentially "non-persons" not covered by any particular federal statutes.

The Panama Canal Zone has historically had significant economic, political and military importance to the United States. With the enactment of the Panama Canal Act of 1979, and the entry into force of the Panama Canal Treaty of 1977, the relationship between the United States and the Republic of Panama, and the operation of the Panama Canal continues to have major economic, political, and military significance. In order to encourage the recruitment and retention of a significant force of U.S. citizen employees to operate the Canal, the United States established a system of public schools for Canal Zone employees.

With the entry into force of the Treaty, and the acknowledgement of sovereignty over the territory by the Republic of Panama, the school system was required to be disestablished, and reconstituted as an adjunct of the Department of Defense. In doing so, the employees of the former school system were substantially integretated into the DoDDS worldwide system. This integration was both

anticipated and intended by the Congress.[4] In addressing the employment status of civilian teachers, Congress made specific reference to certain portions of the U.S. Code which it did not wish to be applied to them. In doing so, Congress clearly indicated that the other sections of the Overseas Teachers Act *would* apply. The Courts below failed to recognize that Congressional intent.

Accordingly, this Court should review the decision of the Federal Circuit and, upon review, reverse that decision.

B. Congress did not intend that teachers employed in Panama would not be "teachers" within the meaning of 20 U.S.C. § 901.

Prior to the entry into force of the Panama Canal Treaty, and the enactment of the Panama Canal Act, there was a strip of land, surrounded on all sides by the Republic of Panama, bordering the Panama Canal, referred to as the Canal Zone. The United States exercised sovereignty throughout the region, including the establishment of a postal system, a system of courts and police, laws and regulations, and a school system. Because of the peculiar nature of the exercise of sovereignty, the Canal Zone was considered a part of the United States, and federal laws expressly and explicitly noted its distinctness in statutes relating to the conditions of employment of U.S. employees of various agencies.

Over the years, resistance and irritation at the exercise of foreign sovereignty within its borders resulted in political and social unrest in Panama, culminating in the negotiation of the Panama Canal Treaty of 1977, and the enactment of the Panama Canal Act of 1979. The most

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[4] *See,* Legislative History of the Panama Canal Act, 1979 U.S. Code Cong. & Admin. News, p. 1034 at 1141. ("The Senate Amendment contained no sabbatical program, in conformity with the Department of Defense worldwide educational system, which will operate the former Canal Zone schools.")

significant feature of the Treaty and the Act was the recognition by the United States of the sovereignty of the Republic of Panama throughout the region, including that area which had been the Canal Zone. Consistent with the exercise of sovereignty by the Republic of Panama, the system of government and government-related functions previously established by the various agencies of the United States had to be dismantled.

After the entry into force of the Treaty, and the effective date of the Act, there were essentially only two principal employers affiliated with United States agencies in the area formerly known as the Canal Zone. The first of these was the Panama Canal Commission, nominally established as an executive agency with joint membership between the United States and representatives nominated by the Republic of Panama. During the life of the Treaty, Panamanian influence was to gradually increase, ultimately leading to complete control by the Republic of Panama. The Commission's functions were limited to the maintenance and operation of the Panama Canal, and it ceased to have any involvement in governmental functions.

The other major employer was the Department of Defense, which had maintained, and still maintains, a significant presence in the area. Additionally, through its various departments, it assumed or continued operation of the system of hospitals and schools for dependents of military and civilian personnel.

In the past, employees of the Panama Canal Company/Government had been regulated under the Panama Canal Employment System (PCES). With the entry into force of the Treaty, and the effective date of the Act, PCES was substantially curtailed, and applied only to certain employees of the Commission. Because of the elimination of governmental functions, and transfer of teachers to DoDDS, the PCES was no longer applicable to teachers.

At the same time, the cession of sovereignty to the Republic of Panama fundamentally altered many of the conditions which made employment in the Canal Zone different from overseas employment generally. In order to accomodate the integration of teachers in Panama into the worldwide system operated by DoDDS, and because their employment was no longer subject to regulation under PCES, Congress clearly intended that teachers transferred into DoDDS by the Act and Treaty, and those employed or assigned to Panama thereafter, would be considered teachers within the meaning of 20 U.S.C. § 901. There were certain specific provisions which Congress did *not* wish to apply to teachers who were employed in Panama prior to the Act, and the specific congressional reference to these provisions underscores the intention that those provisions not specifically addressed were to be applied intact.

For example, in 22 U.S.C. § 3671(c)(1) and (2), Congress specifically provided that Sections 903(c) and 904(a)(2) of Title 20 do not apply to TOF teachers. TOF Teachers were effectively "red-circled" [5] for pay purposes and their accrued leave was not capped. Under ordinary principles of statutory construction, that would mean that those provisions would apply to teachers hired on or after the effective date of the Treaty and Act (non-TOF teachers). In practice, DoDDS has applied them in precisely that fashion. Non-TOF teachers have been paid at a lower level, subject to increases, and their accrued leave has been capped.

If Congress had intended that teachers in Panama, whether TOF or non-TOF, would not be subject to the Overseas Teachers Act *at all* there would be no reason to expressly (and redundantly) preclude the application of

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[5] Wages could not be reduced because of the provisions of 22 U.S.C. § 3671(a), "no less favorable" terms of employment.

903(c) and 904(a)(2) to TOF teachers. Moreover, the Act provided that 903(c) would not apply to TOF teachers

> "*until* the rates of basic compensation established under section 903(c) of Title 20 equal or exceed the rates of basic compensation then in effect for teachers who were so transferred." (emphasis supplied)

In other words, once the pay rates under § 903(c) "caught up to" the rates applicable to TOF teachers, those TOF teachers *would* become subject to pay rates established under § 903(c). Clearly Congress intended that (only) TOF teachers would not be initially subject to pay schedules established by the Overseas Teachers Act. Section 903(c) pay rates were not intended to apply to TOF teachers only because of the *specific* exception of 22 U.S.C. § 3671(c)(1) and then only long enough for wage levels to "catch up."

If, as the government asserted, and as found by the Claims Court and Appeals Court, DoDDS teachers in Panama are not "teachers" within the meaning of § 901, there is no basis whatsoever for the application of the other benefits and limitations of the Overseas Teachers Act to any DoDDS teacher during their tenure in Panama. Nonetheless, that is precisely what DoDDS purports to have done, except for housing. If the decisions below are not reversed, countless personnel actions relating to hundreds of teachers, since October of 1979, would be void, or at least voidable. Nor does there appear to be authority elsewhere in the U.S. Code relating to these employees. Plainly, Congress did not intend that to be the case.

What the Claims Court and the Court of Appeals failed to appreciate is that prior to the entry into force of the Treaty, and the effective date of the Act, teachers in Panama were part of a separate institution. When the Treaty and the Act required that institution to be dismantled, and the governmental function discontinued, Congress elected to integrate the school system in Pan-

ama into the existing and established school system operated by DoDDS worldwide.[6] Despite the clear expression of congressional intention to fully integrate[7] teachers in Panama into that system, the narrow and restrictive interpretation of the Act by the Courts below frustrates that intention, thereby depriving teachers in Panama of rights and protections Congress intended them to have.

C. The Courts below misconstrued the key definitional section of the Panama Canal Act.

Because of the exercise of U.S. sovereignty within the borders of an independent nation, United States law dealing with conditions existing in the former Canal Zone recognized that the Canal Zone, as a juridical entity, was unlike other "foreign areas" and thus required separate treatment. With the entry into force of the Treaty and the Act, much of the basis for separate juridical treatment disappeared. There was still the necessity to refer to geographic areas, but insofar as political and sovereign relationships were involved, the former "Canal Zone" simply ceased to exist. As a result, it was necessary that many of the references to the Canal Zone, in the geographic sense, spread throughout the U.S. code be retained, while those which related to the Canal Zone in the juridical or sovereign sense were allowed, like the Canal Zone, to drift into memory.

The specific definitional sections involved are set out in Section 3 of the Act, 22 U.S.C. § 3602. The Act provides, in subsection (b), that provisions in the Canal Zone Code and other laws of the United States referring to the Canal Zone should be deemed to refer to the "areas and installations in the Republic of Panama made available to the United States pursuant to" the Treaty. Subsection (c) provides the exception, that such shall not

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[6] With certain specific limited exceptions noted above.

[7] *See*, Legislative History, *supra*, at 1141.

apply where "such reference is inconsistent with the provisions of this chapter, or in the context in which a term is used, such reference is clearly not intended". As noted above, Congress clearly did not intend that "Canal Zone" in the definitional section of 20 U.S.C. § 901 would apply to the "areas and installations" after the effective date of the Treaty. Specific references to TOF teachers in § 3671 make it clear that only *portions* of the Overseas Teachers Act were not to apply to TOF teachers, and in the case of pay rates, only until the general DoDDS pay rates "caught up" to the "red circle" pay rate of the particular TOF teacher. Prior to the Treaty, teachers employed in Panama were not employees of DoDDS. After the effective date of the Treaty, they were required to become such, and Congress clearly intended that the Overseas Teachers Act, with certain specific exceptions, would apply to them.

In another portion of the Panama Canal Act, Congress specifically addressed a provision of another statute providing for overseas differentials and allowances. Section 1217(d) of the Panama Canal Act, 22 U.S.C. § 3657(d), makes subchapter III of chapter 59 of Title 5 inapplicable to employees whose duty station is in the Republic of Panama.[8] DoDDS initially took the position that Plaintiffs were not entitled to the relief they sought because of this provision, belatedly discovering that the provision for housing and housing allowance under § 905 is found in a different portion of Title 5, not subject to this proviso.

Moreover, subchapter III of Chapter 59 of Title 5, 5 U.S.C. § 5921, et seq., does not apply to "the Canal

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[8] Congress here unambiguously *meant* Panama. DoDDS has no teachers stationed in Panama, except in "areas and installations made available to the United States pursuant to" the Treaty. Similar language could have been used had Congress wished to preclude DoDDS teachers from coverage under 901. That it did not underscores the "inconsistency" of the conclusion by the government and the Courts below that it was *not* "inconsistent".

Zone." [9] Application of the rationale of the Claims Court and the Court of Appeals would make this section inapplicable in Panama even without Section 1217(d) of the Panama Canal Act. The statutory construction by the courts below ascribes to Congress a preference for redundancy [10], which clearly demonstrates the "inconsistency", which is plainly "not intended" by Congress.

Congress plainly went through those portions of the U.S. Code relating to employee benefits, and consciously selected those which it wished to make inapplicable to employees in Panama, or to certain classes of employees. Congress also, with specificity and particularity, dealt with those provisions of existing law which were not to be applied to TOF teachers. Because Congress was selective and specific in addressing areas which it chose not to be applicable in Panama, and did not establish guidelines to replace or substitute for the Overseas Teachers Act, it is patent that a blanket disenfranchisement in Panama is inconsistent with that Congressional objective.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Federal Circuit in this case.

Respectfully submitted,

FRANK E. HAMILTON, JR.
(Counsel of Record)
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(813) 879-9842

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[9] That statute only applies in a "foreign area", defined as an area outside . . . the Canal Zone. 5 U.S.C. § 5921(6).

[10] "This chapter, which only applies to areas outside [areas and installations in the Republic of Panama] shall not apply in the Republic of Panama."

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 85-2563

ROBERT AURICH, C. R. BRUER, JEAN LAMB, JEFFREY J. RILEY, KATHLEEN SEARS, BRUCE ALLEN THALE, on behalf of themselves and as representatives of all of the DEPARTMENT OF DEFENSE DEPENDENTS SCHOOLS or occupants of teaching positions in the Republic of Panama, etc., and MARGARET L. ACKER, *et al.*,

Appellants,

v.

THE UNITED STATES,

Appellee.

Decided: March 18, 1986

Before SMITH, *Circuit Judge*, BENNETT,* *Senior Circuit Judge*, and BISSELL, *Circuit Judge*.

SMITH, *Circuit Judge*.

This is is an appeal from the United States Claims Court brought by Robert Aurich, et al., and Margaret L. Acker, et al., teachers stationed in the Republic of Panama, who sought damages because the United States Government did not provide them housing or a housing allowance. The Claims Court granted summary judgment for the United States, ruling that appellants were not entitled to housing or to a housing allowance under

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* The Honorable Marion T. Bennett assumed senior status on March 1, 1986.

the Overseas Teachers Pay and Personnel Practices Act (Overseas Teachers Act)[1] or under the Panama Canal Act of 1979 (Panama Canal Act).[2] We affirm.

Issue

The issue is whether the provisions of the Overseas Teachers Act entitled teachers employed by the Department of Defense Dependents Schools, who were stationed in the Republic of Panama, to Government-furnished housing or to a housing allowance, on and after the effective date of the Panama Canal Act.

Background

Appellants are all present or former teachers with the Department of Defense Dependents Schools (DODDS) stationed in the Republic of Panama. Prior to the implementation of the Panama Canal Treaty (treaty), the appellants worked for the Panama Canal Company/Government. After the implementation of the treaty by the Panama Canal Act, the teachers were transferred to the DODDS, a constituent agency within the Department of Defense.[3]

Appellants maintained that they are entitled to Government-furnished housing or housing allowances pursuant to the provisions of the Overseas Teachers Act and other legislation. The DODDS contested the applicability of those provisions to appellants and has not furnished either Government-furnished housing or a housing allowance to them.[4]

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[1] 20 U.S.C. §§ 901 *et seq.* (1982).

[2] Panama Canal Act of 1979, Pub. L. No. 96-70, 1979 U.S. CODE CONG. & AD. NEWS (93 Stat.) 452 (codified at 22 U.S.C. §§ 3601 *et seq.* (1982)).

[3] 20 U.S.C. §§ 921 *et seq.* (1982).

[4] During the course of the litigation in the Claims Court, Congress passed Pub. L. No. 98-600, 98 Stat. 3145 (1984) (to be

Appellants brought an action in the Claims Court seeking damages because the Government did not furnish them housing or a housing allowance. Following cross-motions for summary judgment, the Claims Court ruled in a bench ruling on May 15, 1985, that appellants were not entitled to any recovery because they were not "teachers" covered by the provisions of the Overseas Teachers Act.

Jurisdiction of the Claims Court was based on the Tucker Act as incorporated in the Federal Courts Improvement Act of 1982.[5]

Analysis

In the Claims Court, appellants had the burden of proving that there was a statute, regulation, or contract which entitled them to Government-furnished housing or a housing allowance.[6] The Claims Court was correct in holding that appellants failed to carry this burden.

Appellants argue that they are teachers entitled to housing or to a housing allowance under the Overseas Teachers Act, 20 U.S.C. § 905.

Section 901 of 20 U.S.C. makes it clear that appellants are not "teachers" within the scope of section 905. For the purposes of 20 U.S.C. §§ 901-907, "teachers" is defined as an "individual * * * in a teaching position."[7] A "teaching position" is limited to a position in an "overseas areas." "Overseas area," "for the purposes of this chapter," does not include the Canal Zone. Thus, appel-

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codified at 22 U.S.C. § 3657(a)), which amends the Panama Canal Act to allow the possibility of quarters allowance for those employed in the Republic of Panama.

[5] 28 U.S.C. § 1491 (1982).

[6] *Id.*; *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967).

[7] 20 U.S.C. § 901 (1982).

lants are not "teachers" for the purposes of 20 U.S.C. § 905, because the Canal Zone is not an "overseas area" for the purposes of that section.

Appellants admit that under the ordinary definition of "Canal Zone," contained in the Panama Canal Act,[8] they would not be covered by the provisions of the Overseas Teachers Act. Appellants argue that section 3602(c) of the Panama Canal Act[9] requires that the ordinary definition of "Canal Zone" should not apply to the Overseas Teachers Act because Congress clearly could not have intended that teachers in the Canal Zone would be treated differently from "overseas teachers." We must reject appellants' argument. The Overseas Teachers Act expressly states that the "Canal Zone" is not an "overseas area" for purposes of that act, and there is no indication that Congress "clearly intended" otherwise. Thus, the Overseas Teachers Act does not apply to appellants.

Section 5923 of 5 U.S.C., which permits a housing allowance for United States "employees" stationed in a foreign area, is expressly made inapplicable to employees stationed in the Republic of Panama by the Panama Canal Act, 22 U.S.C. § 2657(d). There is no indication that Congress intended teachers to be treated differently from other United States employes in the Republic of Panama.

Appellants point to section 5912 of 5 U.S.C., which states that housing "may be furnished" to employees stationed in a foreign country "[u]nder regulations prescribed by the head of the agency concerned and approved by the President." Even if we were to assume that section 5912 is applicable to appellants, the section merely

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[8] " 'Canal Zone' shall be deemed to refer to the areas and installations in the Republic of Panama made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements[.]" 22 U.S.C. § 3602(b)(1) (1982).

[9] 22 U.S.C. § 3602(c) (1982).

permits the Government to furnish housing under appropriate regulations; it does not *entitle* employees to housing. Appellants are unable to cite any regulation pursuant to section 5912 or any other regulation that authorizes the Government to furnish them housing.

Conclusion

Appellants have failed to demonstrate that there exists any statute, regulation, or contract which entitled them to Government-furnished housing or to a housing allowance. The judgment of the Claims Court that appellants were not entitled to any recovery is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-2563

ROBERT AURICH, C. R. BRUER, JEAN LAMB, JEFFREY J. RILEY, KATHLEEN SEARS, BRUCE ALLEN THALE, on behalf of themselves and as representatives of all of the DEPARTMENT OF DEFENSE DEPENDENTS SCHOOLS or occupants of teaching positions in the Republic of Panama, etc., and MARGARET L. ACKER, *et al.*,

Appellants,

v.

THE UNITED STATES,

Appellee.

JUDGMENT

On Appeal from the United States Claim Court
In Case No(s). 192-83C & 84-84C

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

DATED March 18, 1986

Issued as a Mandate: April 9, 1986

Costs, against Appellant:

Printing	$234.72
Total	$234.72

IN THE UNITED STATES CLAIMS COURT

No. 192-83C
84-84C

ROBERT AURICH, *et al.* and
MARGARET L. ACKER, *et al.*,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

Courtroom 8, Room 512
U.S. Claims Court
717 Madison Place, Northwest
Washington, D.C.

Wednesday,
May 15, 1985

The parties met, pursuant to notice of the Judge, at 10:00 a.m.

BEFORE: HON. HARRY E. WOOD
Judge

APPEARANCES:

For the Plaintiffs:

FRANK E. HAMILTON, III, ESQ.
Hamilton and Douglas, P.A.
2620 West Kennedy Boulevard
Tampa, Florida 33609
(813) 879-9842

For the Defendant:

ROBERT G. GIERTZ, ESQ.
U.S. Department of Justice
Washington, D.C. 20530

* * * *

[58] THE COURT: For purposes of these cases, Acker and Aurich, the allegations of the complaint in each case, insofar as they are factual allegations, may be and are accepted.

In brief terms that means that the Plaintiffs are teachers employed by the Department of Defense Dependent School Systm and the Republic of Panama who were so employed on or before October 1, 1979 as employees of either the Panama Canal Company or the Canal Zone Government who on effect on October 1, 1979 were administratively transferred to the Department of Defense.

Plaintiffs have been since October 1, 1979 for part or all of the period, at least, employed at areas or installations in the Republic of Canal made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements.

They have not been furnished housing or housing allowances or quarters or quarters allowances by the Department of Defense. Nor were they so furnished housing or housing allowance or quarters or quarters allowance by the Government in any capacity prior to October 1, 1979.

THE COURT: Is there any problem with my statement of the facts thus far, Mr. Giertz, as moving [59] party?

MR. GIERTZ: No, Your Honor.

THE COURT: Mr. Hamilton?

MR. HAMILTON: No, Your Honor.

THE COURT: The basic problem is whether or not the Plaintiffs are entitled to benefits under the provisions of Sections 901, et seq., and in particular Section 903 of Title 20, United States Code dealing with pay and personnel program for overseas teachers. More specifically, the problem is whether following October 1, 1979 Plaintiffs have been employed in an overseas area within the meaning of Section 901 of Title 20.

Prior to October 1, 1979, the Canal Zone was expressly included in Section 901 as part of the United States in a geographical sense.

When Congress enacted the Panama Canal Act of September 27, I believe it is, 1979, Public Law 96-70, that definition was not changed and it remains in the Code today.

Enacting Public Law 96-70, Congress expressly said that, "For purposes of applying laws of the United States and regulations issued pursuant to such laws with respect to transactions, occurrences, or status on or after October 1, 1979."

The words Canal Zone, quote "Shall be deemed to [60] refer to the areas and installations in the Republic of Panama made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements," subject to the provisions of Subsection C of Section 3 of the 1979 Act.

Subsection C, let me start over. Unless that phrase is rendered inapplicable by something in Subsection C of Public Law 96-70, the conclusion that Congress did not intend to confer a right to quarters or quarters allowance on Department of Defense school system, teachers stationed or working at areas and installations in the Republic of Panama made available to the United States pursuant to the treaty and related agreements is impelled.

I do not find anything in the Act, Public Law 96-70 which comes within the definition, quote, "except as otherwise provided in this Act. I do not find that the reference in Subsection B of Section 3 is in anyway inconsistent with the provisions of the Act of September 27, 1979 nor do I find that in the context in which a term is used such reference is clearly not intended.

And finally, nothing with which I am now dealing refers to a time before October 1, 1979. In the circumstances I conclude that Congress did not intend to confer a right to quarters or quarters allowance on Department

of Defense school system teachers stationed at [61] areas and installations in the Republic of Panama made available to the United States pursuant to the treaty of 1977 and related agreements and that Defendant's motion for summary judgment must therefore be granted.

An order so providing will be filed today. The transcript of this hearing will be filed within 30 days and Plaintiff will thereafter have, I think, an additional 30 days within which to appeal.

THE COURT: Mr. Giertz, is there anything in my summation of the conclusions of law that I have reached that you would like to comment on?

MR. GIERTZ: No, Your Honor.

THE COURT: Mr. Hamilton?

MR. HAMILTON: No, Your Honor.

THE COURT: Thank you very much.

Court will stand adjourned.

(Whereupon, at 11:30 a.m., the hearing was adjourned.)

IN THE UNITED STATES CLAIMS COURT

No. 192-83C

ROBERT AURICH, *et al.*

and

No. 84-84C

MARGARET L. ACKER, *et al.*

v.

THE UNITED STATES

(Filed May 15, 1985)

ORDER

Upon the basis of the findings and conclusions stated in the transcript of oral argument held in these cases May 15, 1985, defendant's motion for summary judgment in each case is granted, and plaintiffs' cross-motion for summary judgment is denied. The Clerk will dismiss each complaint pursuant to RUSCC 58.

IT IS SO ORDERED.

/s/ Harry E. Wood
HARRY E. WOOD
Judge

IN THE UNITED STATES CLAIMS COURT

Nos. 192-83 C and 84-84 C

ROBERT AURICH, *et al.*
MARGARET L. ACKER, *et al.*

v.

THE UNITED STATES

[Filed May 15, 1985]

JUDGMENT

Pursuant to the order of May 15, 1985, directing the Clerk to dismiss the above-entitled complaints,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaints are dismissed.

FRANK T. PEARTREE
Clerk of Court

By: /s/ Debra L. Sander
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)

Supreme Court, U.S.
FILED
NOV 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2062

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARGARET L. ACKER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2062

MARGARET L. ACKER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that as employees of the Department of Defense Dependent Schools (DoDDS) in Panama, they are entitled to recover money damages from the government because they were not given government-furnished housing or a housing allowance under a statutory scheme that has since been amended.

1. Petitioners are civilians employed to provide educational services to United States military dependents in the Republic of Panama (Pet. App. 2a). Prior to the effective date of the Panama Canal

Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10030 (Treaty), petitioners were employed by the Panama Canal Zone Government, an agency of the United States responsible for the administration of local government services in the then-existing Canal Zone. The Canal Zone was an area within the Republic of Panama over which the United States exercised "rights, power and authority [that it] would possess and exercise if it were the sovereign" of the Zone. Isthmian Canal Convention, Nov. 18, 1903, United States-Panama, art. III, 33 Stat. 2235. When the Treaty entered in force on October 1, 1979, the Canal Zone Government was dissolved and Panamanian sovereign power was extended over the area. See *O'Connor* v. *United States*, No. 85-558 (Nov. 4, 1986) slip op. 1. The school system administered by the former Canal Zone Government was transferred to the auspices of the Department of Defense, and the teachers became employees of the DoDDS, a constituent agency of that Department. Pet. App. 2a.

Petitioners brought this damages action in the United States Claims Court. They contend that, upon the transfer of the school system to the DoDDS, petitioners became entitled to the provision of government-furnished housing or a housing allowance pursuant to Section 7 of the Defense Department Overseas Teachers Pay and Personnel Act, 20 U.S.C. 905. The Claims Court and the United States Court of Appeals for the Federal Circuit rejected this claim, concluding that instructors stationed in Panama are not within the defined coverage of the Act (Pet. App. 3a-4a).

2. The court of appeals fully considered petitioners' claim and correctly decided the issues. The decision below does not conflict with any decision of this Court

or of any other court of appeals. In addition, recent amendments have altered the statutory framework so there would be no precedential value to any decision by this Court on the narrow question of statutory construction presented in the petition. In these circumstances, further review is plainly unwarranted.

Contrary to petitioners' contention, the question in this case is not whether petitioners are in some colloquial sense "teachers" who are employed "overseas." Rather, the issue is whether they fall within the defined scope of the Act. The court of appeals accurately summarized the statutory scheme (Pet. App. 3a-4a) (footnote omitted):

> Section 901 of 20 U.S.C. makes it clear that [petitioners] are not "teachers" within the scope of section 905. For the purpose of 20 U.S.C. §§ 910-907, "teachers" is defined as an "individual * * * in a teaching position." A "teaching position" is limited to a position in an "overseas area." "Overseas area," "for the purposes of this chapter," does not include the Canal Zone. Thus, [petitioners] are not "teachers" for the purposes of 20 U.S.C. § 905, because the Canal Zone is not an "overseas area" for the purposes of that section.

Petitioners argue that this express exclusion of teachers employed in the Canal Zone was superseded by the Treaty. But the Panama Canal Act of 1979, Pub. L. No. 96-70, § 3(b)(1), 93 Stat. 455, 22 U.S.C. 3602(b)(1), which implements the Treaty, preserves the pre-existing exclusion by providing that references in earlier statutes to the "Canal Zone" shall be deemed to refer to those "areas and installations in the Republic of Panama made available to the United States." 22 U.S.C. 3602(b)(1).

Even if petitioners could demonstrate a statutory basis for their claim, the Defense Department Overseas Teachers Pay and Personnel Act does not make such housing benefits mandatory. See *Acker* v. *United States*, 620 F.2d 802, 805 n.4 (Ct. Cl. 1980). Accordingly, the DoDDS would retain discretion to grant or deny government housing or housing allowances to petitioners.[1]

Finally, as the court of appeals recognized (Pet. App. 2a n.4), during the course of this litigation Congress amended the Panama Canal Act to permit housing allowances for United States employees stationed in the Republic of Panama. Pub. L. No. 98-600, 98 Stat. 3145 (codified at 22 U.S.C. (Supp. II) 3657). Thus, petitioners are eligible for such benefits in the future at the discretion of the DoDDS (and have been so eligible since the effective date of the amendment, October 1, 1984). In light of that amendment, the sole issue remaining in this case is whether petitioners are entitled to money damages because they did not receive housing benefits under the statutory scheme that existed prior to the recent amendment. Since any decision on that question of statutory construction would have no prospective significance, this case does not warrant an exercise of this Court's discretionary certiorari jurisdiction.

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[1] On March 13, 1984, petitioners' union filed an action in the United States District Court for the District of Columbia seeking injunctive relief that would have provided housing for petitioners. In denying the union's motion for a preliminary injunction, the district court held that the Department of Defense had acted "in a fair and equitable manner" in its administration of housing for DoDDS instructors in Panama. *Panama Canal Federation of Teachers, Local 29* v. *Reagan*, C.A. No. 84-0784 (D.D.C. June 2, 1984), slip op. 18. No appeal was taken from that decision.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

★ U. S. GOVERNMENT PRINTING OFFICE: 1986 181483 40097